ISSUED: December 24, 2002

D.T.E. 02-47

Complaint of Fiber Technologies Networks, L.L.C., pursuant to G.L. c. 166, § 25A and 220 C.M.R. § 45.00 et seq. against Verizon New England d/b/a Verizon Massachusetts and Western Massachusetts Electric Company

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ORDER OF DISMISSAL WITHOUT PREJUDICE

APPEARANCES:

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Respondent

I. INTRODUCTION

On August 13, 2002, Fiber Technologies Networks ("Fibertech") filed a complaint with the Department of Telecommunications and Energy ("Department") against Verizon New England d/b/a Verizon Massachusetts ("Verizon") and Western Massachusetts Electric Company ("WMECo") (collectively, "the utilities") pursuant to G.L. c. 166, § 25A ("Pole Attachment Statute") and 220 C.M.R. § 45.00 et seq. ("Pole Attachment Regulations").[1] Fibertech alleges that the utilities failed to grant or deny Fibertech's requests to attach fiber optic cables to the utilities' poles, ducts, and conduits in the towns and cities of Agawam, Easthampton, Northhampton, and Springfield, Massachusetts within 45 days after the requests were made (Complaint at 5-6). Fibertech asserts that because utilities are required to grant the requests or confirm the denial in writing by the 45th day after the request is made, the requests are "deemed granted" (id. at 5, 9-10). Fibertech also alleges that when the utilities did respond to attachment requests, the utilities issued discriminatory make-ready estimates[2] (id. at 8-9). Therefore, on or about June 22 and 23, 2002, Fibertech installed fiber optic cable on the utilities' poles and conduits without having first received written permission to install the fiber (id. at 11).

In response, Verizon and WMECo commenced actions against Fibertech before the Hampden Superior Court, seeking a declaratory judgment that Fibertech breached aerial and

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[1] On August 13, 2002, Fibertech also submitted a motion pro hac vice for its corporate counsel Charles B. Stockdale and Robert T. Witthauer. We grant this motion.

[2] Make-ready costs are the costs of making the attachment site accessible and preparing the site to comply with the appropriate safety, reliability, or engineering standards prior to attaching a new line.

conduit agreements between them, and therefore, that the agreements may be terminated. Verizon and WMECo also sought injunctive relief to prevent Fibertech from attaching additional fiber to their poles and to order Fibertech to remove its existing attachments (Verizon Answer at 2; WMECo Answer at 2).

Fibertech's complaint before the Department seeks interim relief to prevent the utilities from terminating the existing aerial and conduit agreements, dismantling the fiber, forcing payment for additional make-ready work, and taking retaliatory action against Fibertech (Complaint at 14-15). The complaint before the Department also requests, among other things, that the Department order the utilities to allow Fibertech access to poles and conduits; hold that certain aspects of the utilities' permitting process are unfair barriers to entry, and open an inquiry into the permitting process to allow comments from other competitive telecommunications providers; hold that pole attachment applicants cannot be required to pay the costs of correcting pre-existing engineering and safety compliance issues; require the utilities to file with the Department (with notice to all pole licensees and license applicants) any changes to the "make-ready process" and establish a review of the make-ready process and costs; and require the utilities to return to Fibertech any unnecessary make-ready charges paid by Fibertech (Complaint at 15-16).[3]

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[3] On September 23, 2002, Fibertech moved for leave to amend its complaint to add Massachusetts Electric Company ("MECo") as an additional respondent in this proceeding (Motion for Leave to Amend Petition for Interim Relief and Complaint ("Motion to Amend")). Fibertech asserted that the legal issues involved in Fibertech's proposed action against MECo are substantially the same as in the instant proceeding. This motion is addressed below.

On August 19, 2002, the Hampden Superior Court issued a preliminary injunction against Fibertech to enjoin Fibertech from making further attachments to poles owned by Verizon or by Verizon and WMECo jointly without express written authorization from the owners, from the court, or from the Department. Verizon New England, Inc. v. Fibertech Networks, LLC, No. 02-831, consolidated with Western Massachusetts Electric Company v. Fibertech Networks, LLC, No. 02-843 (Hampden Super. Aug. 19, 2002) (memorandum of decision on plaintiffs' motions for preliminary injunction) ("Hampden Injunction"). Upon finding that Fibertech is committing a continuing trespass with respect to each unauthorized attachment, and upon finding that the attachments create a hazard to the public, the court further ordered Fibertech either to remove the unauthorized attachments or to pay for the cost of correcting all conditions that Verizon and WMECo determine are hazards to "health, safety and welfare of their employees, their licensees, or the public," to which conditions the

attachments were a "substantial contributing factor," to be corrected within 60 days. Id. at 5-7, 10-12.[4]

II. DISMISSAL WITHOUT PREJUDICE

The Department has stated that it will not review generalized assertions of wrongdoing in reviewing complaints under the Pole Attachment Statute and Regulations. See, e.g. Boston Edison Company, D.P.U./D.T.E 97-95, at 98 (2001) (noting that "the complainants were free to bring a complaint pursuant to the pole attachment statute and regulations about a specific instance of intentional delays" by a utility); Greater Media, Inc., D.P.U. 91-218, at 26-27 (denying non-rate relief under the Pole Attachment Statute and Regulations because the complainants failed to alleged specific instances of retaliatory activity). A properly filed complaint by a licensee under the Pole Attachment Regulations must state a clear and concise allegation that "it has been denied access to a pole, duct, conduit, or [right-of-way]" owned or

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[4] The court ordered Fibertech to pay Verizon for the cost of correcting the hazardous conditions on Verizon's and WMECo's poles in the amount of $400,000. Any amounts of this sum remaining after Verizon corrects the hazardous conditions would be returned to Fibertech. Hampden Injunction at 10. The court stated that by electing the option to pay the cost of correcting the hazardous conditions rather than removing all of the attachments itself, Fibertech would be deemed to have waived the right to challenge the corrections before completion of all of the corrections, but that afterwards, Fibertech could recover amounts that were expended for corrections that were not corrections of conditions that were hazards to health, safety, or welfare of utility employees, licensees, or the public. Id. at 10-11 n.7. The court further stated that Fibertech was to pay the cost of correcting hazardous conditions to which its attachments were a substantial contributing factor, even if it should ultimately be determined that it would not have been Fibertech's responsibility to pay for the cost of the corrections, or some portion of them, had the make-ready work been performed before Fibertech made the unauthorized attachments, and that by choosing the option to pay for the corrections Fibertech would be deemed to have waived this theory of recovery. Id.

controlled by a utility, or allege that "a rate, term, or condition for an attachment is not just and reasonable." 220 C.M.R. § 45.02 (emphasis added). That is, the complaint must identify specific poles to which access has been denied or effectively denied, or must identify specific attachment rates, terms, or conditions claimed not to be just and reasonable. Notice pleading, or merely stating general facts to give a defendant fair notice of the nature of the claim, as opposed to stating precise facts, cf. Mass. R. Civ. P. 8(a) and reporter's note (1973), cannot properly state a claim in a proceeding before the Department under the Pole Attachment Statute and Regulations.

Although Fibertech alleges that Verizon and WMECo denied pole attachments for some pole attachment requests, imposed unreasonable procedural delays for other pole attachment requests, and imposed unreasonable make-ready charges for some pole attachment requests, the Complaint does not specifically identify a single attachment or rate. Rather, the Complaint refers generally to attached exhibits that are no more than a hodge-podge of un-indexed correspondences, application forms, payment invoices, and other documents. Although the information that we require litigants to include in their complaints under 220 C.M.R. § 45.04 may well be included somewhere in those documents, they do not form a clear and concise statement of which poles are in dispute, or which rates, terms, or conditions are being challenged.[5]

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[5] Indeed, we note that many of the documents appear to indicate that Fibertech withdrew a large number of the pole attachment applications without explanation.

Further, under any statement of facts, we cannot grant the remedies sought in Fibertech's prayer for relief, because they are generalized requests for relief. Fibertech has not alleged any specific instance of retaliatory action, but rather, requests a broad directive from the Department. In the past, the Department has denied this type of relief, leaving complainants free to bring a complaint when a specific retaliatory activity is alleged. D.P.U. 91-218, at 27. Accordingly, the Department will not address the utilities' permitting process in general, or the obligations of pole attachment applicants generally to pay make-ready charges. Rather, if Fibertech can state a claim under the Pole Attachment Statute and Regulations[6] regarding a denial of a specific pole attachment or a specific attachment rate, term, or condition for attachment alleged to be unreasonable, it may request access to that pole[7] or request modification of that specific rate, term, or condition. Therefore, we dismiss Fibertech's complaint without prejudice.

We also find that the Hampden Superior Court's August 19, 2002 injunction renders moot Fibertech's requests to prohibit the utilities from dismantling Fibertech's unapproved attachments and for relief from paying certain make-ready costs. We note that the court has ordered corrections to the attachments that pose a hazard to the public and that Fibertech was ordered to pay all make-ready costs to correct hazardous conditions on poles for which

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6 In addition to proper pleadings, Fibertech must also provide the information required under 220 C.M.R. § 45.04.

7 In reviewing a denial of access claim, the Department determines whether the denial was for "valid reasons of insufficient capacity, reasons of safety, reliability, generally applicable engineering standards, or for good cause shown." 220 C.M.R. § 45.03(1). Unless the identical conditions are present for all of the relevant attachment sites, this review is made on a pole-by-pole basis.

Fibertech's attachments were a substantial contributing factor to the hazardous conditions. The Hampden Superior Court's jurisdiction over (1) Verizon and WMECo's breach of contract and trespass claims, (2) the requests for declaratory judgment, and (3) the requests for injunctive relief before that court is independent of the Department's own jurisdiction to review the rates, terms, and conditions for the pole attachments that are the subject of both proceedings. Even if the Department were to review Fibertech's entitlement to remain on the unapproved attachments or Fibertech's obligation to pay make-ready costs for these attachments, the court's preliminary injunction would still stand. Moreover, although the Department has authority to grant interim relief on rates, terms, and conditions for attachments, that court correctly noted that we do not have the equitable power to issue injunctions in this case.[8] Cf. Hampden Injunction at 6 n.4. Therefore, the Department cannot grant the requested relief regarding the unauthorized attachments.

Because we dismiss the complaint, it is unnecessary to rule on Fibertech's Motion for Leave to Amend its Petition for Interim Relief and Complaint to add Massachusetts Electric Company ("MECo") as an additional respondent in this proceeding or to rule on Fibertech's Motions to Compel Production of Discovery Responses by Verizon and WMECo. In the interest of administrative economy, however, it may be helpful to note now that although the transactions or occurrences from which Fibertech's proposed action against MECo arises may be similar to those in this case, the analysis that the Department will apply will still require a

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[8] See, e.g., Department of Pub. Util. v. New York, New Haven & Hartford R.R. Co., 304 Mass. 664, 674 (1939).

pole-specific or rate-specific review. If Fibertech intends to seek relief under the Pole Attachment Statute and Regulations in an action against MECo, it must allege specific facts sufficient to state a claim, as discussed above.

Also for administrative economy, we address two additional points raised by the parties in their pleadings. First, we note that there is nothing in our Pole Attachment Regulations to suggest that a pole attachment request is "deemed granted" if a written denial is not issued after 45 days pursuant to 220 C.M.R. § 45.03. Rather than engage in self-help, an applicant should follow the procedures for filing a complaint alleging that it has been improperly denied access to the requested poles. 220 C.M.R. § 45.04; see also Hampden Injunction at 8. We take this opportunity to remind the utilities, however, that they are obligated to grant the application or deny it in writing within 45 days after the requests are made. 220 C.M.R. § 45.03.

Second, there is no relief that the Department may grant to Fibertech at this time pertaining to any attachment that Fibertech installed without first obtaining permission from the utilities. The remedy to a legitimate denial of access claim is to order a utility to permit the licensee to install its attachments. Fibertech cannot sustain a denial of access claim under 220 C.M.R. § 45.04(e), because it already has physical access to the poles. We are unable to dismiss these claims with prejudice at this time, however, because, as we have discussed above, Fibertech never identified a single pole attachment for the Department to review. If, however, the utilities actually impose unreasonable rates, terms, or conditions for the right to keep those attachments on the poles, Fibertech may be able to file a proper pole attachment complaint at that time under 220 C.M.R. § 45.04(b).

III. MOTION FOR PROTECTIVE ORDER

On August 13, 2002, Fibertech filed a Motion for Protective Treatment of Confidential Information ("Motion") in order to protect from public disclosure all of the documents that it attached to its complaint on the grounds that the documents may disclose information "including, but not limited to, the location of Fibertech's facilities" and that this information is competitively sensitive (Motion at 2). We find that the motion fails to meet the Department's standards for protective treatment.

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the Department shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, [or] confidential, competitively sensitive or other proprietary information;" second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

We deny the motion on two grounds. First, Fibertech makes an unsubstantiated blanket assertion that all of the documents submitted must be protected. As we noted above, the exhibits submitted were an assortment of essentially un-indexed documents, and, after a review of the documents, it is apparent that many of the documents make no mention of the actual locations of Fibertech's facilities. Beyond the locations of its facilities, Fibertech has not identified any other type of sensitive information with sufficient specificity for us to consider. Therefore, the requested confidential treatment is not narrowly constructed to protect only the documents alleged to contain sensitive information. The motion is also severely deficient because it fails to identify any particular document and the reason why the document should be accorded protective treatment.

Second, we find that Fibertech's assertion of harm, i.e., that the documents may disclose the location of its facilities and that this information is sensitive, is not valid.

Fibertech's facilities, fiber optic cables, are open to any casual observer (see, e.g., Verizon Answer, exh. 5 (photographs of Fibertech's aerial attachments)). The locations of Fibertech's facilities are publicly available, and, therefore, protective treatment by the Department is unwarranted.

IV. ORDER

After due consideration, it is

ORDERED that the Complaint of Fibertech against Verizon and WMECo is DISMISSED WITHOUT PREJUDICE; and it is

FURTHER ORDERED that Fibertech's Motion for Protective Treatment of Confidential Information is DENIED.

By Order of the Department,

/s
Paul B. Vasington, Chairman

/s
James Connelly, Commissioner

/s
W. Robert Keating, Commissioner

/s
Eugene J. Sullivan, Jr., Commissioner

/s
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).